JOHN R. ANDERSON

IBLA 82-1044 Decided March 10, 1983

Appeals from decisions of the Oregon State Office, Bureau of Land Management, dismissing protest and rejecting offers to lease for oil and gas. OR 25061 through OR 25069.

Affirmed in part, set aside in part, and remanded.

1. Oil and Gas Leases: Generally -- Oil and Gas Leases: Applications: Generally -- Rules of Practice: Generally -- Rules of Practice: Appeals -- Notice of Appeal

   Where BLM informs an offeror for an over-the-counter oil and gas lease that it is prepared to issue a lease provided certain stipulations are signed and returned within 30 days of receipt of BLM's decision, the decision is interlocutory and the 30-day period for filing a notice of appeal will not begin until the compliance period has been concluded.

2. Federal Land Policy and Management Act of 1976: Wilderness -- Oil and Gas Leases: Applications: Generally

   Consistent with Secretarial policy directives, where an oil and gas lease offer embraces lands in a wilderness study area, action on such an offer must be suspended, to the extent that the lands are within a wilderness study area, until Congressional action is taken on the President's recommendations as provided by sec. 603(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(a) (1976).

APPEARANCES: John R. Anderson, pro se.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

John R. Anderson appeals from five decisions of the Oregon State Office, Bureau of Land Management (BLM), dated April 16, May 3, May 26, May 28, and June 11, 1982, dismissing his protest and rejecting over-the-counter offers to lease for oil and gas OR 25061 through OR 25069.

By decision of April 16, 1982, BLM informed appellant that it was prepared to issue leases for lands in offers OR 25061 through OR 25067 and offer OR 25069 1/ provided appellant signed and returned certain stipulations, including a stipulation to avoid impairing wilderness suitability. Appellant was granted 30 days from receipt of this decision in which to return the stipulations. Failure to meet this requirement would result in rejection of appellant's offers, BLM stated. The decision concluded with the sentence, "This decision is not final, but is an interlocutory decision from which no appeal may be taken."

Despite this concluding sentence, appellant filed a notice of appeal with BLM on May 21, 1982, stating that BLM's decision was adverse to his interests. Appellant also stated that he would file a statement of reasons within 30 days of his notice.

By decision of May 28, 1982, BLM informed appellant that it had treated his notice of appeal as a protest. The decision of April 16 was not final, BLM stated, because it was not final action by BLM and in no way terminated appellant's applications, rights, or priorities. BLM further stated that the April 16 decision was not an adverse action and, therefore, was not subject to appeal before this Board. The decision also held that a decision calling for additional evidence, or as in this case, the signing of stipulations, and by itself imposing no penalty for noncompliance was an interlocutory decision and as such was not subject to appeal. Anticipating the merits of Anderson's appeal, BLM referred to a prior decision of this Board, John R. Anderson, 57 IBLA 149 (1981), wherein the Board upheld a decision of the Arizona State Office requiring acceptance of a wilderness protection stipulation. The May 28 decision concluded with the standard appeals paragraph, informing Anderson of a right of appeal to this Board.

Apparently enclosed within the same envelope as the May 28, 1982, decision was yet another decision of BLM, dated May 26, 1982. 2/ This form decision informed appellant that his offers had been rejected for failure to return the required stipulations. The standard appeals paragraph was similarly included in this decision. Thereafter on July 1, 1982, appellant filed a second notice of appeal, seeking review of BLM's decisions of May 26 and 28.

1/ BLM seems to have dealt with offer OR 25068 separately. By decision of May 3, 1982, it informed Anderson of the need to sign and return certain stipulations. By letter filed June 4, Anderson appealed this decision. BLM treated this notice of appeal as a protest by letter of June 11, dismissed the protest, and rejected offer OR 25068. Anderson appealed this decision on July 9.

2/ This date of issuance of this decision may be in doubt inasmuch as the file copy bears the initials of an individual who approved the decision on May 27, 1982.

[1] The issue whether BLM properly characterized as interlocutory its requirement that appellant sign certain stipulations has recently been addressed by this Board under slightly different facts. In Carl Gerard, 70 IBLA 343 (1983), the Board held that where a BLM decision clearly contemplates that an offer will be rejected upon the running of a period of time granted by BLM for compliance with its requirements, such a decision was interlocutory and not subject to appeal. The decision is, in effect, an interim determination affording an applicant an opportunity to correct a perceived deficiency prior to rejection of the application. On receipt of such a decision, a party may elect to comply in the manner prescribed, comply under protest, or await the running of the identified period and appeal the final rejection. Id. at 346.

In the instant case, Anderson was not adversely affected by a BLM decision until his receipt of BLM's May 26 decision rejecting his offers. Accordingly, BLM's characterization of its April 16 decision as interlocutory was correct, and we may proceed to the merits of this appeal.

In his statement of reasons, appellant contends that BLM acted arbitrarily and capriciously in failing to identify by the usual method of land description those lands subject to the wilderness stipulation. Instead of describing these lands by legal subdivision, section, township, and range, BLM included the following paragraph in the stipulations:

> In order to expedite leasing, the exact areas involved have not been delinated [sic], they may be ascertained from the attached map or the BLM district office having jurisdiction over the area. To avoid unnecessary delays in processing, we urge you to contact them to allow for wilderness consideration in developing your operating plan.

Appellant did not include with his statement of reasons the map provided by BLM, but he states that it was of such small scale that he could not determine which lands were definitely affected by the wilderness stipulation. Given the frequently irregular boundaries of an area subject to wilderness review, the better course would have been for BLM to avoid using a map to inform appellant of which areas were affected by wilderness stipulations.

[2] Our examination reveals that most of the lands sought by appellant are in the Diablo Mountain wilderness study area. Although we would otherwise have set aside BLM's decision to afford appellant a period of time to execute the required stipulations, we note that the Secretary has announced on December 30, 1982, that the Department will issue no leases in wilderness study areas until further notice. Pursuant thereto, the Director, BLM, issued Instruction Memorandum No. 83-237 on January 7, 1983, which provides:

> Leases currently in process should not be issued. * * * All such applications are to be maintained as pending until further notice. * * * Applications to lease lands within [wilderness study areas] will continue to be accepted and will remain pending with priority as of the date of filing until Congressional action is taken on the President's recommendations.

Accordingly, the State Office is directed to suspend further action on appellant's lease offers to the extent that they include lands in a wilderness study area. To the extent that such offers include lands outside a wilderness study area, BLM is directed to issue the lease(s) all else being regular.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is affirmed in part, set aside in part, and remanded for action consistent herewith.

Anne Poindexter Lewis
Administrative Judge

I concur:

James L. Burski
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING CONCURRING:

While in full accord with the majority opinion, I wish to expound on the subject of interlocutory decisions, lest our holding in this case and in Carl Gerard, 70 IBLA 343 (1983), be misunderstood.

Historically, BLM has, from time to time, followed the practice of issuing decisions captioned "Application Held For Rejection," or "Application Rejected Subject To Compliance," or something similar. Such decisions may, or may not, be interlocutory, depending on their content.

Where the adjudicator has taken up the case, reviewed the application and the record relating thereto, done the necessary research of the law and regulations, secured the necessary reports and recommendations, and arrived at a determination that the application in its present form is deficient in some respect(s), he can do one of three things: (1) He can summarily reject the application; (2) He can call upon the applicant to cure the deficiency and wait to continue the adjudication; or (3) He can declare the application rejected, but allow the applicant the opportunity to cure the deficiency or appeal within a stated time, failing which the case will be closed. Alternative (3) is just as much a final decision to reject as is alternative (1). The adjudication is complete. A decision has been made to reject, and the application (or offer) stands rejected. The adjudicator will not take up the case again for review unless the supplementary submission is filed. Because the rejection is declared as a matter of present fact, such a decision is adverse to the applicant, and the appeal period runs from the date of its receipt by the applicant. Such a decision might better be captioned, "Application Rejected Subject To Reinstatement Upon Further Submission." Whether such an application will preserve its original priority or take priority from the date of submission will depend on the nature of the case, the nature of the submission, and the prevailing circumstances. 1/

However, when the decision merely calls on the applicant to cure a perceived deficiency in the application or to provide something additional by submitting information, evidence, or money, no final decision adverse to the applicant has yet been made by BLM, even where the decision advises the applicant that a failure to comply within the prescribed time will render the application "subject to rejection," as the actual rejection has not occurred at that point, and remains a matter for the exercise of discretion. See Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969); Pressentin v. Seaton, 284 F.2d 195 (D.C. Cir. 1960). Even a contingent decision to reject in futuro is not subject to appeal immediately, as the adverse action has not yet occurred, but is only anticipated. Such a decision is interlocutory.

1/ This would depend largely on whether or not the application comported with the regulations when originally filed. For example, an oil and gas lease offer accompanied by the proper advance rental would not lose priority if the rental amount were raised while the offer was pending, and it was necessary for BLM to require payment of the balance. By contrast an application for a desert land entry which was deficient to any extent in the amount of the accompanying per acre payment could earn priority only from the date the deficiency was rectified.

Clearly, where the decision by BLM expressly states that it is not final, but is an interlocutory decision from which no appeal may be taken (as did the April 16, 1982, decision in this case), it must be treated as such unless it can be shown that in fact it is not, and that it does have an immediate adverse affect on the applicant, notwithstanding its recitations.

The point is that BLM has the necessary flexibility to structure its decisions in such a way as to best accomplish its legitimate functions. However, its personnel must understand the effect of giving their decisions immediate finality (absent appeal) as compared to giving them contingent future finality. It is apparent that the author of the BLM decisions in this case understood that distinction very well.

Edward W. Stuebing
Administrative Judge